No. 92-1203

In the Supreme Court of the United States

OCTOBER TERM, 1992

ANTHONY F. DIANDRE AND METRO DENVER MAINTENANCE CLEANING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the special agent who conducted a federal tax investigation concerning unreported income received by Metro Denver Maintenance Cleaning, Inc., and its sole shareholder, Anthony F. DiAndrea, violated the return information confidentiality provisions of Section 6103 of the Internal Revenue Code, 26 U.S.C. 6103, by issuing "circular letters" to customers of Metro Denver Maintenance Cleaning, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 968 F.2d 1049. The opinion of the district court (Pet. App. B374-B394) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1992. A timely petition for rehearing was denied on September 22, 1992. The petition for a writ of certiorari was filed on December 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1985, the Internal Revenue Service began a tax audit of Metro Denver Maintenance Cleaning, Inc. (MDMCI), and of its sole shareholder, Anthony F. DiAndrea.[1] MDMCI provided janitorial services on a contract basis primarily to corporate customers (Pet. App. A3). In addition, MDMCI performed non-contract "side jobs" for customers (*id.* at A9; Pet. 5).

During the audit, the revenue agent discovered substantial evidence of potential tax fraud. There appeared to be two sets of profit and loss statements containing different figures for the same period; DiAndrea admitted that he habitually inflated his travel and entertainment expense deductions;[2] and he appeared to be living beyond his means. On the basis of these and other badges of fraud, the revenue agent referred the case to the Internal Revenue Service's Criminal Investigation Division (Pet. App. A4-A5).

The criminal investigation was conducted by Special Agent Shirley Kish Thomas. In connection with her investigation, Agent Thomas issued a summons to MDMCI and to DiAndrea for accounting records, banking records, and other financial information for the period under investigation. In addition, Agent Thomas prepared a "circular letter" to assist in gathering information needed to complete her investigation.[3] A copy of the cir-

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[1] Mr. DiAndrea's name is misspelled in the caption as a result of a typographical error carried over from the original complaint (Pet. App. A3 n.1).

[2] The revenue agent testified that DiAndrea indicated to him that, "if he wanted a * * * deduction of $10,000, he would deduct [$]20,000 because his experience with the appeals division * * * indicate[d] that he would be allowed half of that amount" (Tr. 185-186).

[3] A "circular letter" is described in the IRS's Internal Revenue Manual as a "written request to third parties for information

cular letter was sent to each of the 27 customers for whom MDMCI performed work between June and November of 1987 (Pet. App. A5-A7, B379). The letter explained that the Internal Revenue Service was conducting an audit of MDMCI and that DiAndrea was an officer of the corporation (*id.* at A5-A6). The letter requested information concerning "all payments made to or on behalf of Metro Denver Maintenance and/or Mr. DiAndrea" during the relevant period (*id.* at A6). An attachment to the circular letter requested the following information (*ibid.*):

> [T]he date, check number, amount and form of all payments(s). By form of payment, it is meant if the payment(s) was made in cash, check, money order, etc.

Agent Thomas also issued a summons to each of DiAndrea's and MDMCI's banks for all records pertaining to either of them (*id.* at A7). Agent Thomas testified that the circular letters were used "to ensure that there were not additional receipts in addition to the bank deposit amounts" (Tr. 250).

Agent Thomas was able to reconcile most of the bank records and the records obtained from DiAndrea and MDMCI with their tax returns. The records also revealed that DiAndrea had several money market accounts, which explained his apparent ability to live beyond his means. The responses to the circular letters did not reveal any pertinent information concerning potential fraud. Agent Thomas ultimately concluded that the amount of under-reported income did not satisfy the guidelines for criminal prosecution. She therefore terminated the criminal investigation (Pet. App. A7-A8).

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where more than ten letters of a similar nature are sent" (Internal Revenue Service Manual, Handbook for Special Agents § 347.1 (Sept. 8, 1980)).

2. DiAndrea and MDMCI subsequently filed suit against the United States, contending that Agent Thomas's use of the circular letters wrongfully disclosed tax return information in violation of the confidentiality rules of Section 6103 of Internal Revenue Code, 26 U.S.C. 6103.[4] Under Section 6103, tax return information generally may not be disclosed unless specifically authorized by the Code. Section 6103(k)(6), however, authorizes an internal revenue officer to disclose tax return information in connection with an audit or a civil or criminal tax investigation if the "disclosure is necessary in obtaining information * * * not otherwise reasonably available" (26 U.S.C. 6103(k)(6)).

After a bench trial, the district court held that the circular letters revealed tax return information concerning MDMCI—such as the name and address of MDMCI, that DiAndrea was an officer of the corporation, that a criminal investigation was being conducted, and that records in the Internal Revenue Service's possession revealed transactions between MDMCI and the recipients of the circular letters (Pet. App. A8-A9). The district court held that these disclosures of tax return information were not authorized by Section 6103(k)(6) because the the disclosures were not necessary to obtain information concerning the investigation that was "not otherwise reasonably available" (26 U.S.C. 6103(k)(6)). The court concluded that the circular letters were not needed to obtain information concerning undocumented cash payments (Pet. App. A9-A10, B384). Although the district court recognized that "you can't use bank records to determine whether there were cash payments" if the pay-

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[4] Section 7431(a)(1) of the Internal Revenue Code, 26 U.S.C. 7431(a)(1), authorizes an award of civil damages against an officer or employee of the United States who knowingly or negligently discloses tax return information in violation of Section 6103.

ments were not deposited in a bank account (Pet. App. B383), the court nevertheless concluded that the search for cash payments was merely an "after the fact attempt to justify what the special agent was doing in June of 1987, because in June of 1987, she didn't have the bank records" (*id.* at B382). The district court further stated that "[t]here was no suspicion that any of these customers were paying Mr. DiAndrea in cash. And that could have been the only basis on which the circular letters would have been sent" (*id.* at B384).[5]

The district court stated that there were only three instances in which it was necessary to contact the customer to obtain needed information. The court concluded that the other 24 circular letters impermissibly disclosed tax return information in violation of Section 6103. Since one of those letters had been addressed to two people, the court concluded that there were 25 acts of unauthorized disclosure (Pet. App. B377, B381, B385). The district court entered judgment in favor of MDMCI in the amount of $25,000—based on the statutory minimum damages of $1,000 per disclosure—stating that actual damages of a greater amount had not been proven (*id.* at B393).[6] Because the circular letters revealed none

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[5] The district court acknowledged that one check had been "cashed out without being deposited" by DiAndrea, but stated that "that could have been followed up by contacting the single customer whose check was [not] deposited" (Pet. App. B384). The court stated that it was "not clear" whether Agent Thomas knew that the check had been cashed, rather than deposited, at the time the circular letters were issued (*id.* at B385).

[6] The district court also concluded that it was unnecessary for the circular letters to disclose the fact that the investigation was being conducted by the Criminal Investigation Division of the Internal Revenue Service. The court held, however, that that disclosure was based on a "good faith" interpretation of Section 6103 and therefore was not a basis for imposing damages against the government (Pet. App. B386-B390). See 26 U.S.C. 7431(b).

of DiAndrea's tax return information, the court dismissed DiAndrea's complaint (Pet. App. A11).

3. The court of appeals reversed (Pet. App. A1-A22).[7] The court noted that the information sought in the circular letter was unquestionably relevant to the determination of MDMCI's and DiAndrea's tax liability. The court concluded that the information sought in the circular letter was "not otherwise reasonably available" and therefore held that the government's disclosures were authorized by Section 6103(k)(6).

The court stated that, while information concerning undocumented cash payments did not appear to be the primary focus of the circular letter, "the letter clearly does request information on this subject," and "[i]nformation on receipt of undocumented cash payments was not available from any source other than from the payor" (Pet. App. A16). The court of appeals concluded that the district court "strayed beyond the parameters of [S]ection 6103 when it sought to determine Agent Thomas['s] subjective intent and when it concluded that insufficient justification was shown to warrant delving into whether cash payments were made" (Pet. App. A18). Following *Barrett* v. *United States*, 795 F.2d 446, 451 (5th Cir. 1986), the court held that the inquiry under Section 6103 is whether the disclosures were necessary to obtain information sought, not whether there was probable cause or any other level of justification warranting the investigation (Pet. App. A18-A19). The court therefore concluded that Section 6103 did not prevent Agent Thomas from seeking information concerning cash payments "even if she did not

[7] DiAndrea did not cross-appeal from the dismissal of his complaint and was not a party to the appellate proceedings (Pet. App. A11 n.3).

suspect cash payments and even if the badges of fraud could be legitimately explained" (Pet. App. A20).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The circular letters mailed by Agent Thomas requested information concerning all payments made to MDMCI or to DiAndrea. They also sought to determine whether those payments were made in cash or by check (Pet. App. A6-A7). Agent Thomas testified that the circular letters were sent "to ensure that there were not additional receipts in addition to the bank deposit amounts" (Tr. 250). The court of appeals correctly determined that undeposited cash payments could not reasonably be discovered by any means other than by sending the circular letters (Pet. App. A16; see also *id.* at B382).

Section 6103(k)(6) does not impose restrictions on the type of information the government may seek.[8] The only issues under Section 6103(k)(6) are (i) whether a disclosure of tax return information was necessary to obtain information pertaining to the tax investigation and (ii) whether the information sought is not "otherwise reasonably available" from other sources. See *Barrett* v. *United States*, 795 F.2d at 451. The court of appeals cor-

[8] Petitioners did not question whether mailing the circular letters was within the IRS's investigative authority. The authority of the Internal Revenue Service to investigate does not depend upon probable cause to believe a violation of the tax laws has occurred. See 26 U.S.C. 7601, 7602. An Internal Revenue Service investigation may be based merely on a suspicion that the law is being violated, "or even just because it wants assurance that it is not." *United States* v. *Powell*, 379 U.S. 48, 57 (1964).

rectly rejected the district court's contrary holding that such information requests must also be based upon a genuine suspicion that undocumented cash payments actually had been received.[9]

2. There is no merit to petitioners' contention that the decision in this case conflicts with *Barrett* v. *United States*, *supra*. The issue in *Barrett* was whether information concerning possible cash payments made to a taxpayer was reasonably available from sources other than the taxpayer's patients. See 795 F.2d at 451. In *Barrett*, the district court resolved that question in favor of the government on a motion for summary judgment. On appeal, the Fifth Circuit held that the issue should not have been resolved on summary judgment because there was a genuine issue of fact as to whether, if other sources of information had been exhausted before the circular letters were issued, most of the 400 circular letters mailed in that case would have been unnecessary. 795 F.2d at 450.[10]

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[9] Petitioners assert that the request for information concerning cash payments was only "inadvertently" included in the circular letters by Agent Thomas (Pet. 20, 24, 27). Petitioners therefore contend that Agent Thomas did not genuinely "seek information pertaining to cash payments" (Pet. 20). The district court did not find that the requests for information concerning cash payments in the circular letters were inadvertent. See Pet. App. B374-B395. Nor did the court of appeals adopt that factual contention. Petitioners' unsupported factual assertion that the requests for information concerning cash payments were merely accidental provides no basis for further review by this Court.

[10] Petitioners' contention that *Barrett* "then went on to hold that there was a violation of Sec. 6103 because information pertaining to cash payments was reasonably available from sources other than the taxpayer's customers" (Pet. 28) simply misreads the decision in that case. The case was remanded for trial on that issue. 795 F.2d at 450-451.

In the present case, the district court agreed with the government's contention at trial that undeposited cash payments could not be discovered by means other than by sending the circular letters (Pet. App. A16, B382). The court did not find that circular letters would have been unnecessary if Agent Thomas had first obtained bank records.[11] Instead, the district court concluded that there was not sufficient justification to request information concerning cash payments in the circular letters because Agent Thomas did not possess a subjective suspicion that cash payments had in fact been made. Under *Barrett*, however, the court may "*not* inquire whether the information sought is necessary," but only whether the disclosure was necessary to obtain the information because it was not otherwise reasonably available. 795 F.2d at 451.[12] The decision in this case thus does not conflict with *Barrett*.

3. Petitioners also assert (Pet. 25) that the circular letters were not authorized under the guidelines set forth in the IRS's Internal Revenue Manual. That contention is plainly without merit. As the excerpt from the

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[11] Petitioners err in asserting that the district court "did not address the question of whether cash payment information could be found from sources other than the payors" (Pet. 20-21). The district court did not doubt that circular letters were an appropriate method for discovering such information (Pet. App. B382). It is obvious that customer inquiries (concerning whether cash payments had been made) were needed to determine whether cash payments existed that had not been deposited in a bank.

[12] Petitioners also assert that, in determining whether the circular letters violated Section 6103, the court of appeals erred in failing to "balance Petitioner's right to confidentiality with the I.R.S.'s need for the information sought" (Pet. 26). Section 6103(k)(6) does not permit courts to devise and apply balancing tests; instead, it expressly provides that tax return information may be disclosed where the disclosure is necessary to obtain information not otherwise reasonably available. 26 U.S.C. 6103(k)(6).

Internal Revenue Manual on which petitioners rely states, circular letters may be mailed to third parties when, "in the view of the Chief [of the] Criminal Investigation Division," the third party is a likely source of information and the information sought is important to the investigation. Internal Revenue Service Manual, Handbook for Special Agents § 347.2 (Sept. 8, 1980). It was stipulated in this case that the mailing of the circular letters and their attachments was approved by the Chief of the Criminal Investigation Division (C.A. App. 30). Petitioner offered no evidence to suggest that, in approving issuance of the letters, the Chief of the Criminal Investigation Division concluded that the recipients of the circular letters were not likely sources of information or that the information sought was not important to the investigation. Petitioners' assertion that mailing the circular letters violated Section 347.2 of the Internal Revenue Manual thus has no support in the record.

In any event, it is well established that, while the Manual provides general guidance to audit agents, it in no way binds the IRS or carries the force of law. See *United States* v. *Will*, 671 F.2d 963, 967 (6th Cir. 1982); cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). Section 6103 of the Code does not provide a cause of action based on whether provisions of the Internal Revenue Manual were, or were not, followed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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